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84-1396

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARNOLD I. KRAMER,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a Judge, in sentencing a defendant, may consider the legal argument made by defendant's counsel as a basis for enhancing the severity of the sentence.

2. Whether a sentence of four years, consisting of consecutive one year sentences, for tax misdemeanors, is so disproportionate as to violate the Eighth Amendment rights of the defendant.

THE PARTIES

The Petitioner is Arnold I. Kramer, the Defendant-Appellant below. The Respondent is the United States of America, the Plaintiff-Appellee below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARNOLD I. KRAMER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Arnold I. Kramer, petitions this Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, to review the order entered November 1, 1984, affirming Petitioner's conviction and sentence to imprisonment before the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The order of the Court of Appeals appears as Appendix A to this Petition, pages A-1 to A-4. The judgment of the district court appears as Appendix C, pages C-1 to C-2.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1984. Petition for rehearing was denied on February 14, 1985 (Appendix B, page B-1). This Court has jurisdiction under 28 U.S.C. Sec. 1254(1). Jurisdiction in the District Court arose under 26 U.S.C. Secs. 7203 and 7206(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendments V, VI, VII, and VIII. Also, 26 U.S.C. §7203.

STATEMENT OF THE CASE

Kramer was indicted in five counts; four for failing to file income tax returns in four consecutive years,[1] and one count for filling in an "x" in a box on an extension form relating to a tax return. He was convicted on all counts, after a bench trial, and sentenced to four consecutive one year sentences on the misdemeanor counts, a $10,000 fine, and probation on the felony count. The conviction was affirmed by order (Appendix C, pages C-1 to C-2).

During the trial the Court said, in addressing the various burdens that are imposed on a defendant when the Government proves that it did not receive his tax returns, these words:

> . . . the government's burden is discharged when the government produces evidence that its tax records show no filing. Then the burden shifts to Mr. Kramer to come forward with evidence. . . .

(Trial transcript, p. 314).

The trial progressed, and the Defendant was convicted, having failed to provide a sufficient reason for his failure to file. He is a lawyer, without prior criminal record, and there was no evidence that he owed taxes, and no charge of tax evasion. The Court, in sentencing Kramer, called attention to the motion for a new trial filed by Kramer's attorney. In that motion, the lawyer had argued that the Court improperly shifted the burden of proof to the Defendant. (Common Law Record, document 42, p. 3). This con-

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[1] A misdemeanor charge, punishable by one year imprisonment and a $10,000 fine. 26 U.S.C. §7203.

tention offended the trial judge. In sentencing Kramer to four consecutive one-year sentences on the charges of failing to file tax returns the Judge said (Tr. 417):

> Also, I think one can read the motion for a new trial filed here. The motion for a new trial is consistent with Mr. Kramer's behavior throughout these matters and the best example of it, I think, is the point that Mr. Ackerman raised about the fact that I made some comment when I was making findings of fact and reaching conclusions of law, that I had shifted the burden of proof to Mr. Kramer. I got the distinct impression from Mr. Ackerman that it was Mr. Kramer who thought of this idea and suggested it to Mr. Ackerman, when the record shows I did not do that. These are the reasons I am imposing the sentence.

There was no evidence that Kramer thought of the idea of contending that the Court had shifted the burden of proof.

There was no evidence to indicate that the raising of the "shifting of the burden of proof" as a legal argument was presented in a manner dictated by Kramer, or that Kramer intended any insult to the dignity of the Court by the making of the argument.

There was no evidence that the making of such an argument, based on this record, demonstrated bad character.

Bond was denied pending appeal, and only reinstated upon application to the Court of Appeals.

The Court of Appeals affirmed, but, although this issue was raised, did not consider it in the order affirming the conviction and sentence.

REASONS FOR GRANTING THE WRIT

I.

THE IMPOSITION OF A SENTENCE BASED UPON A LAWYER'S ARGUMENT DENIES DUE PROCESS OF LAW.

Due process of law should be held to allow imposition of sentence on a defendant only for what the defendant has done. At times, the sentence may include considerations relating to the bad character of the defendant, not necessarily involving the crime charged, but always the sentence must reflect society's judgment on the Defendant for his discretionary actions. This is the underpinning of the theory of criminal law of personal accountability, and the requirement of proportionality taught by *Solem v. Helm*, ____ U.S. ____, 77 L.Ed.2d 637, 103 S.Ct. 3001 (1983) is based upon a consideration of the person's conduct judged alongside the law. Due process requires that the sentencing decision be based upon an accurate judgment as to the Defendant's actions. *United States v. Williams*, 668 F.2d 1064, 1071 (9th Cir. 1981).

In this case Kramer received what the prosecutor admitted before the Court of Appeals to have been the most harsh sentence for misdemeanors inflicted in our Circuit, and a sentence more severe by one year than asked for by the prosecutor at sentencing. No claim is made that Kramer has a prior record, is of Mafia connection, or is a habitual criminal. He is a lawyer who did not file his tax returns on time.

The trial judge set forth his reasons for the sentence, and one of the reasons arose from the motion for a new

trial, in which Kramer's lawyer argued that the Court had shifted the burden of proof to the Defendant.[1]

The Court considered the making of this argument to amount to an act of Kramer, and the quotation from the sentencing accurately reflects the Court's displeasure. No conjecture of counsel is required; Kramer is punished for the legal position which his lawyer took on the motion for new trial.

Sentences have been regularly reversed where based on inadmissible considerations, of gender, *United States v. Maples*, 501 F.2d 985 (4th Cir. 1974), of state of origin, *United States v. Diamond*, 561 F.2d 557 (4th Cir. 1977), of the commission of crimes pending for trial before other courts, *United States v. Shelton*, 669 F.2d 446, 467 (7th Cir. 1982); *See Townsend v. Burke*, 334 U.S. 736, at 741 (1948).

The Court of Appeals was presented precisely with this issue. (Appellant's Brief, p. 30 *et seq.*) That Court considered this point to be covered by a statement that the trial court could consider, in sentencing, whether or not "his defense was fabricated." (Appendix A, page A-3).

The trial judge did not consider the "defense fabricated;" His Honor believed that the legal point taken was bad, and that it came from Kramer. That is different from a fabricated defense, based on false assertions of evidentiary fact, as in *United States v. Grayson*, 438 U.S. 41 (1977). The successful—or unsuccessful—taking of a legal position should not enhance a sentence or mitigate a

[1] The argument is based on what the Judge said, Tr. 417, *supra*, page 4, and on the reported decisions on the subject. The argument is one that could, in good faith, be made by an advocate.

crime. *United States v. Weltz*, 426 F.2d 615, 619 (3rd Cir. 1970); *Gov't. of Virgin Islands v. Henry*, 533 F.2d 876 (3rd Cir. 1976).

We contend that a client must rely on the lawyer, and that the lawyer owes the client reasonable skill in his defense. *Strickland v. Washington*, ____ U.S. ____, 80 L.Ed.2d 674, 104 S.Ct. ____ (1984). In that exercise, due process requires that the lawyer be free to raise legal points—even if the point is not of universally accepted validity, and that the failure of the legal point to persuade the Court should not enhance the severity of the sentence.

The Sixth Amendment requires such a result. A lawyer, to be effective, must be allowed to present all of the arguments which are in his client's favor. The lawyer cannot presume that the Court will rule for or against any particular argument; if the argument can logically be made and would be helpful if successful, then it should be made. *Strickland* teaches this.

And, if the argument is not successful, or is found to be ill founded, it is the lawyer's fault, and not the fault of the client, and the client's sentence should not be enhanced for that reason, as was done in this case.

We contend that sentencing is as important as the trial. It is one thing to bind a defendant to guilt because he has an incompetent lawyer, but something else to convict him simply *because* he has a bad lawyer. To the same effect, sentencing is to punish bad conduct—but only of the Defendant.

We submit that this case impacts the Fifth, Sixth and Seventh Amendments, and ask that the writ be granted.

II.

THE SENTENCE IN THIS CASE IS SO GROSSLY DISPROPORTIONATE AS TO VIOLATE THE COMMAND OF THE EIGHTH AMENDMENT.

"Cruel and unusual" sentences violate the Eighth Amendment. (U.S. Const., Amendment VIII). A sentence as to which the only cruelty is length may be "cruel and unusual." *Solem v. Helm*, 77 L.Ed.2d 637 (1983).

In *Solem* this Court reversed a life sentence without possibility of parole imposed for a series of non-violent felonies.

This case involves four years for misdemeanor sentences—obtained without proof of fraud or anything more than the low level of "wilfulness" required for a conviction under the statute. (26 U.S.C. Sec. 7203). It is an unusual sentence—possibly the only one of its kind. It is especially unusual when inflicted upon a person without a prior criminal record, and it may be compared with the sentence of probation imposed on the felony count in this case. This severity itself is a factor in the review of a sentence against the Eighth Amendment standard. *See Roberts v. Collins*, 544 F.2d 168, 173 (4th Cir. 1976) (dissenting opinion).

This Court said, in *Solem v. Helm*, at 77 L.Ed.2d 645, that the final clause of the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime involved." *Solem* dealt only with imprisonment. Misdemeanors, by definition minor crimes, should not be punished with a severity on a par with such crimes as burglary or embezzlement.

This is not proportionate. If not based on the Court's reaction to counsel's motion, the sentence is still contrary

to the constitution. The trial court punished more severely for a misdemeanor than for a felony; the imposition of greater punishment for the lesser crimes was held unconstitutional under the Eighth Amendment in *Roberts v. Collins*, 544 F.2d 168 (4th Cir. 1976).

And, the requirement of equal protection of the laws is implicated in sentencing; proportionality has in it an element of equal protection. *Dunn v. United States*, 376 F.2d 191 (4th Cir. 1967).

The review of sentences by the length thereof is sanctioned by *Solem*; this Court said:

> It is clear that a 25 year sentence generally is more severe than a 15 year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts. (*Solem*, 77 L.Ed.2d at 652).

Citing *Baldwin v. New York*, 399 U.S. 66, 26 L.Ed.2d 437, 90 S.Ct. 1886 (1970), this Court noted that "a court properly may distinguish one sentence of imprisonment from another." (*Solem*, 77 L.Ed.2d at 653). And "a criminal sentence must be proportionate to the crime for which the defendant has been convicted. No penalty is per se constitutional." *Solem*, 77 L.Ed.2d at 649.

The misdemeanor sentence here is disproportionate, and violates the command of the Eighth Amendment.

CONCLUSION

For these reasons, Petitioner respectfully prays that the writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued September 18, 1984

November 1, 1984.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 84-1308 vs.

ARNOLD I. KRAMER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
The Honorable **George N. Leighton**, Judge Presiding.

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by designation.

ORDER

Defendant, Kramer, appeals his conviction and sentence on four counts of willful failure to file his income tax returns when due and on one count of willfully subscribing a false Application for Extension of Time to File his 1973 income tax return. For the reasons set forth below, this Court AFFIRMS the district court's verdict and sentence.

Kramer contends that certain acts and omissions of his trial counsel denied him his sixth amendment right to effective assistance of counsel. Kramer fails to show: (1) that counsel made errors so serious that counsel was not functioning as "counsel" as described in the sixth amendment. To satisfy this element, the convicted defendant must identify the acts or omissions that fell below an objective standard of reasonable professional conduct; and (2) that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 52 U.S.L.W. 4565, 4570-1 (U.S. 1984). The record neither supports nor refutes any of Kramer's allegations regarding his counsel's action and Kramer may not satisfy his burden under *Strickland's* first prong with a sterile trial record. *See United States v. Brown*, 739 F.2d 1136, 1145 n.8 (7th Cir. 1984). Kramer does not satisfy *Strickland's* second prong because he presents little evidence that under the totality of the circumstances he was prejudiced by his attorney's conduct. *See Arrowood v. Clusen*, 732 F.2d 1364, 1369 (7th Cir. 1984). Because of the nature of the charges against Kramer, the evidence available to the prosecution and the strength of the government's case, nothing trial counsel might have done differently could have affected the result. *See United States ex rel. Williams v. Twomey*, 510 F.2d 634, 639 (7th Cir. 1975), *cert. denied sub nom. Sielaff v. Williams*, 423 U.S. 876 (1975).

Kramer claims that the statute of limitations bars his prosecution under Count I of the superceding indictment. Having failed to raise this issue at trial, Kramer waived his right to the statute of limitations defense on appeal. *United States v. Meeker*, 701 F.2d 685, 687-88 (7th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 96 (1983).

Kramer also contends that the government's evidence was insufficient to support the trial judge's verdict. Viewing the evidence in the light most favorable to the government, this Court finds that the record as a whole contains ample evidence to support the district court's finding of guilty beyond a reasonable doubt. *See United States v. Feinberg*, 535 F.2d 1004, 1009 (7th Cir. 1976), Any rational trier of fact could find the defendant guilty beyond a reasonable doubt based on the evidence presented. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), reh'g denied, 444 U.S. 890 (1979); *United States v. Moya*, 721 F.2d 606, 610 (7th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1312 (1983).

Finally, Kramer asks this court to reverse his sentence on the grounds that the sentence is: (1) disproportionately severe; and (2) based on improper considerations. This Court will not disturb the sentence imposed by a trial court except on a plain showing of gross abuse. *United States v. Marshall*, 719 F.2d 887, 891 (7th Cir. 1983). Kramer was sentenced to four years incarceration and a $10,000 fine. He was convicted under a statute providing for a maximum sentence of seven years incarceration and a $45,000 fine. A sentencing judge may consider as aggravating circumstances: (1) whether a convicted defendant perjured himself at trial; and (2) whether his defense was fabricated. *United States v. Grayson*, 438 U.S. 41, 44 (1977).

In light of Kramer's culpability, his deliberate and repeated defiance of the Internal Revenue laws, his use of perjury at trial and the knowing use of a fabricated legal argument, the district court acted within the scope of its discretion in pronouncing a sentence within the prescribed statutory limits. *Solem v. Helm*, ____ U.S. ____, 103 S.Ct. 3001, 3011 (1983).

For the above reasons, the district court's decision is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 14, 1985.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 84-1308 vs.

ARNOLD KRAMER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 CR 219—**George N. Leighton,** *Judge.*

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* The Honorable Robert A. Grant, Senior District Judge of the Northern District of Indiana, is sitting by designation.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Defendant-Appellant, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 CR 219-1

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARNOLD I. KRAMER,

Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 02-16-84 with counsel Allan Ackerman.

PLEA—Not Guilty.

FINDING & JUDGMENT—There being a finding of guilty. Defendant has been convicted as charged of the offense(s) of knowingly, willfully and unlawfully failing to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Chicago, at Chicago, Illinois and making an application for extension of time to file, which extension form defendant did not believe to be true and correct;

In violation of Title 26, United States Code, Sections 7203, 7206(1).

SENTENCE OR PROBATION ORDER—The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR on Count 1 of the Indictment.

FURTHER ADJUDGED THAT consecutive to the sentence imposed on Count 1 the defendant is to serve one year imprisonment on each of Counts 2, 3 and 4, for a total period of incarceration of FOUR (4) YEARS.

FURTHER ADJUDGED that on Count 5, the defendant is committed to the custody of the Attorney General or his authorized representative for a period of THREE (3) YEARS. On Count 5 the sentence is suspended and the defendant is placed on probation at the conclusion of his serving the custody imposed in Counts 1 through 4, for a period of FIVE (5) YEARS.

ADJUDGED that the defendant is to pay a fine of TEN THOUSAND DOLLARS ($10,000.00) on Count 1. ORDERED that execution of sentence is stayed until before noon, March 16, 1984.

* * * * *

/s/ George N. Leighton
U. S. District Judge

Date Feb. 16, 1984